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Order 99-10-20  
Served: October 20, 1999

**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

Issued by the Department of Transportation  
on the 20th day of October, 1999

Joint Application of

**AMERICAN AIRLINES, INC.  
and  
LINEA AEREA NACIONAL CHILE, S.A.  
(LAN CHILE)**

under 49 U.S.C. Sections 41308 and 41309 for  
approval of and antitrust immunity for alliance  
agreement

**Docket OST-1997-3285 - 63**

Application of

**LAN CHILE S.A.**

for exemption authority under 49 U.S.C. § 41301

**Docket OST-1999-6295 - 7**

Application of

**ALASKA AIRLINES, INC.**

under 14 C.F.R. Part 212 for a statement of  
authorization permitting code-share services

**Docket OST-1999-6296 - 4**

**ORDER ON PETITION FOR RECONSIDERATION**

On October 4, 1999, United Air Lines, Inc. (United) filed a petition for reconsideration of Order 99-9-9. Upon reconsideration, we affirm our determinations in that order approving and granting immunity to the Alliance Agreement between American Airlines, Inc. (American) and Linea Aerea Nacional Chile, S.A. (LAN Chile). Our determinations in this matter will be effective upon implementation of the open-skies provisions of the agreement between Chile and the United States, insofar as it relates to foreign air transportation, subject to certain limits and conditions as indicated therein.

United maintains that our actions in this matter will foreclose competition at Miami. The carrier also asserts that in its desire to achieve open skies with Chile, the Department has not undertaken an appropriate analysis of the competitive impact of this alliance, particularly at Miami. Contrary to the Department's findings, United says that its analysis shows that local Miami-

Santiago traffic constituted 50 percent of the total U.S.-Santiago traffic. United argues that it has already provided evidence to the Department that shows that approval of alliances between American and other foreign-flag carriers at Miami had resulted in a loss of competition, for example in the U.S.-Central America market. United maintains that any new services provided U.S. carriers in the U.S.-Chile market will not succeed in attracting Miami passengers. The carrier disputes the Department's finding that competing alliances may provide competition for ~~the American-LAN Chile arrangement. United says that there has already been a reduction in~~ services by competing carriers in the affected market. At a minimum, United urges the Department to deny the partners code-sharing authority for local traffic in the Miami-Santiago market.

On October 14, 1999, Continental Airlines, Inc. (Continental) and the Joint Applicants filed answers. Continental urges the Department to reconsider Order 99-9-9. It asks the Department to defer final approval of antitrust immunity for the proposed alliance and code sharing and to defer its approval of the Alaska Airlines-LAN Chile applications until the Department approves Continental's request to code share with Avant on U.S.-Chile routes. Continental argues that unnecessarily expansive "safety reviews" as part of the Department's licensing and authorization process are delaying competitively needed service.

Finally, the Joint Applicants in their Answer maintain that the petition offers nothing new and that the Department should deny it. They argue that the Department has already considered the issue of competition in the Miami-Santiago market and has taken steps to address the concerns previously stated by United and others.

## DECISION

As an initial matter, regarding United's concerns about the Miami-Santiago market, our decision in the Final Order fully recognizes that this market raises competitive concerns; specifically regarding the alliance partners' (1) hub strength at each end of the Miami-Santiago market, and (2) joint ability to set prices and capacity that would reduce or eliminate competition in this market. We acknowledged that the alliance agreement, as proposed, might diminish competition in certain respects in that market. American is the hub-dominant airline at Miami, and the applicants may therefore have some power over prices and capacity in this market. Therefore, we found it appropriate and consistent with previous determinations in cases involving situations similar to these, to exclude certain local traffic in the **Miami-Santiago** market for time-sensitive passengers traveling on certain "unrestricted fares" (i. e., published fares not requiring either a Saturday night stay or a minimum stay of seven days or more). The bulk of passengers who typically use these latter "restricted" fares have greater flexibility in time of travel, which permits them readily to take advantage of competing **one-stop** and connecting fares on other carriers? Moreover, United's **arguments** do not persuade us that these previously imposed conditions and limits will not effectively address the competitive concerns in the Miami-Santiago market, which is the only market where both applicants operate their own flights.

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<sup>1</sup> See Orders 96-5-12 at 23-24 and 96-5-26 at 26.

United begins its Petition with the assertion that the Department appears to have allowed its desire to reward countries for entering into open skies agreements to take precedence over its duty to provide a “reasoned analysis” of the competitive impact of the American/LAN Chile alliance, particularly at Miami.<sup>2</sup> United earlier posed this assertion as a question in its Reply to the Order to Show Cause.<sup>3</sup> The assertion was not accurate then, and is not accurate now. The Department’s competitive analysis is found on pages 17-20 of the Show Cause Order and on pages 9-14 of the Final Order. In fact, based on that analysis, the Department placed a condition on its approval, excluding certain fare categories in the Miami-Santiago market from the grant of antitrust immunity.

The Department’s final order responded to United’s objection to this analysis in detail, at pages 9-11, noting that “the essence of the objections to our Show Cause Order is that the proposed alliance at issue will close the door to competition between the U.S. and Chile and other markets in South America.” The Department first noted that its competitive analysis was the basis for a number of conditions on approval of the alliance, including exclusion of immunity for capacity, fares, and yield management decisions regarding U.S.-source local passengers in the Miami-Santiago market, the only market where both applicants operate their own flights. It then detailed reasons why open skies is the predicate for specific findings that there would be unprecedented competitive opportunities for new entry, new service and new competition in the U.S.-Chile market and other interdependent international markets; and that the growth of other airline networks would be promoted in the region as well as around the world.

The Department found that the record shows that open skies would provide opportunities for new service and competition by existing and new entrant carriers. The Department considered such factors as the size and rapid growth of the U.S.-Chile market, that the number of passengers in that market traveling beyond the current gateway cities will provide ample feed opportunities to U.S. carriers over their own gateway cities, that strong traffic growth between Chile and third countries should provide additional traffic support for new services and allow for new competitive network services in the region, and the more competitive pricing environment will in turn stimulate new traffic to support additional U.S.-Chile air service. The Department also noted that each of the U.S. airlines participating in this proceeding were already well-positioned to compete effectively in the U.S.-Chile market, with well-developed traffic distribution systems, extensive domestic and international route networks, equipment tailored to the markets, and partnerships or alliances that are already serving Latin America. As an example, it noted Delta’s intention to serve Chile and a number of other new South American destinations over Atlanta in its partnership with Air France. A more recent example is provided by LAN’s proposed code-share arrangement with Alaska Airlines, a major West Coast carrier that might open markets in competition with the Miami gateway.

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<sup>2</sup> Petition, at page 2.

<sup>3</sup> Reply at 3.

The grant of antitrust immunity is not a “reward” for open skies, but open skies certainly must be part of the competitive analysis of the application, since that is the type of market in which the applicants would operate. We have stated that the U.S. negotiating position is not that antitrust immunity can be a predicate for an Open Skies agreement, but indeed, an Open Skies agreement is a predicate for even considering whether to approve any such application.

In our tentative and final orders in this case, we found that there is substantial traffic flowing between the United States and Chile to support U.S.-Chile operations in the market. United does not dispute the existence of a large flow traffic base to support new service and does not even contend that there is inadequate traffic to support additional service by other carriers.

Specifically, with respect to the Miami-Santiago market, United says that its analysis shows that local Miami-Santiago traffic constituted 50 percent of the total U.S.-Santiago traffic. In Order 99-9-9, the Department’s evaluation of the U.S.-Chile market showed that about 80 percent of the total U.S.-Chile traffic flows from a point behind **Miami**.<sup>4</sup> United argues that the Department’s analysis is flawed. It states that the O&D Survey data, which the Department used, understate foreign carrier traffic because the only foreign carrier data reported are those relating to interline services between a U.S. and foreign carrier. We agree with United’s understanding of the O&D Survey data. Nevertheless, we affirm our determinations in this matter.

United’s reliance on the proportion of Miami-Santiago traffic as a percentage of total U.S.-Santiago traffic, including foreign carrier O&D data, is misplaced, indeed missing the larger picture of U.S.-Chile traffic flow. We use the U.S.-carrier-only O&D data as our source because they identify the extent of connecting traffic that flows beyond Miami to other U.S. cities. This flow includes traffic that LAN Chile transports between Santiago and Miami. This traffic, in part, will support service from additional U.S. gateway cities. Thus, while we agree that the Miami share of the U.S.-Chile market is sufficiently large to cause concern, we conclude that other U.S. carriers can compete by use of the flow traffic beyond Miami to support new service over their own respective hubs. This service will in turn compete with beyond service over the Miami hub.

Indeed, this source of flow traffic is rapidly growing as shown by the exhibit United used to support its position? United’s exhibit shows that for calendar 1996, the U.S. carrier O&D between the U.S. and Santiago is just under 200,000 passengers. Less than two years later, for the year ended September 30, 1998, this has increased by about 40 percent, or by more than 80,000 passengers. The traffic growth during this period, between Santiago and U.S. cities other than Miami, exceeds the total current U.S. carrier local traffic between Miami and Santiago. This increase occurred under a restricted bilateral regime. Open skies between Chile and the United States will provide the opportunity to increase significantly this behind-Miami traffic.

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<sup>4</sup> Order 99-9-9 **fn.** 20.

<sup>5</sup> See Exhibit UA-5 attached to United’s comments dated March 13, 1998.

Moreover, the increasing traffic between Santiago and the U.S. is not the only source of connecting traffic to support new service between the U.S. and Santiago. Just as has occurred in other markets that gain better access to the global market, we can expect traffic between Santiago and beyond U.S. cities also to expand rapidly, once other global network systems link Santiago via their hubs in the U.S. Thus, United's argument does not reflect the current situation in a ~~rapidly-changing market, and therefore does not persuade us to change our decision.~~

In support of its position, United contests our evaluation of the open-skies experience in Central America by saying that its own evaluation shows that the total number of weekly frequencies and seats available in the Miami-Central America market is declining and American's share of the service available is increasing, since open-skies agreements were signed with the Central America countries. We have carefully considered the concerns expressed in this proceeding about the impact of the alliance on competition in the Miami-Santiago market. In response to those concerns, we imposed conditions on the operations of the alliance to facilitate competition in the market. Those conditions include requiring the partners to compete -- not collaborate -- for those Miami-Santiago passengers that may lack other effective aviation alternatives. A second condition would provide other airlines with the opportunity to enter commercial arrangements with LAN Chile by denying the alliance carriers the authority to maintain an exclusive relationship. Other conditions would operate to monitor the effects of the alliance and to provide an effective review of the results of our efforts! United has not shown that these conditions would not be effective in maintaining competition. With respect to United's contention that service to Central America is declining since the introduction of open skies in the U.S.-Central America market,' while our review of OAG monthly schedule data for the April 1998 and 1999 periods also found that frequencies declined in the affected market, our review further established that when comparing the May 1998 period with the May 1999 period, frequencies increased. Importantly, our evaluation of the OAG schedules for the periods April 1998 through November 1999, suggests no substantial diminution of services in the affected markets.

United also maintains that its review of the "lowest available roundtrip fare" in the Miami-San Jose, Guatemala, Panama City, and San Salvador markets shows that fares have risen significantly between June 1998 and June 1999. As indicated in Order 99-9-9, we do not find that the use by United of a "lowest available roundtrip fare" is an appropriate indicator of price competition in a market. For example, we cannot determine the availability of this fare to the traveling public. Additionally, United's example does not include information about fare levels and availability of other fares in the market. For these reasons, we conclude that average fares are a better indicator of competition in a market.' We have again reviewed the average fare in

<sup>6</sup> See Order 99-9-9, Appendix A.

<sup>7</sup> United says that it compared the total number of "weekly nonstop frequencies scheduled between Miami and the nine principal destinations in Central America" for the period April 1998, against the total number of "weekly scheduled nonstop flights" in these markets for the period April 1999, and concluded that "frequencies and seats available in Miami-Central America city pairs" have declined.

<sup>8</sup> The O&D Survey (Data Bank 1B) provides average fares.

each of these markets. A comparison of fares for the 4th Quarter 1998 (the most current data available to the Department at the time we finalized our decision in this case) and the 4th Quarter 1996 (a comparable period before the U.S.-Central America open-skies accords became effective) shows that average fares between Miami and each of these Central American cities decreased.' Moreover, since the issuance of Order 99-9-9, the Department has made available

-- - 1st Quarter 1999 data. A review of the 1st Quarter 1999 period as compared to the 1st Quarter 1998 period shows that in each of the markets identified by United average fares have decreased." For these reasons, we affirm our earlier determination that it appears that open skies is having a positive effect on competition in the U.S.-Central America market.

In its petition United asserts that the Department's findings and conclusions regarding its ability to compete with the American-LAN Chile alliance were based on erroneous assumptions. United notes that the U.S.-Brazil agreement does not provide for code sharing between Brazil and third countries. Therefore, neither the United-Varig nor the Delta-Transbrasil alliances can engage in code sharing between Brazil and Chile. As an initial matter, the Department's decision did not support the contention that a Chilean or Latin America hub was needed to compete effectively with the American-LAN Chile alliance.<sup>11</sup> Moreover, while the U.S.-Brazil agreement may prevent the two arrangements from code sharing in the affected market at this time, the two partnerships can still coordinate their services.

Moreover, we determined that U.S. airlines have the incentive and ability to enter and expand their operations., In this regard, our decision recognizes that each of the U.S. airlines participating in this case now relies on its network hubs in the United States -- and these hubs alone -- to serve thousands of markets in the United States and around the world. In addition, in many instances other international networks link these domestic networks, providing access to hundreds more cities around the globe. This very access, in turn, provides traffic that supports the enhanced service between each city and the hub. In the instant case, this global access will provide the flow traffic that will enable other U.S. airlines to serve Chile from their domestic hubs, and in this fashion provide service alternatives to compete with American and LAN Chile.

In arguing that the Department relied on untested assumptions about the opportunities for new and expanded competitive service in the U.S.-Chile market under open skies, United claims that the Department's expectations ignore "the marketplace reality". It cites published OAG schedules showing that Continental has recently reduced Newark-Santiago service from daily to five frequencies per week.<sup>12</sup> It also cites its own reduction in service through suspension of one-stop service between Miami and Santiago via Lima.

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<sup>9</sup> Also, Order 99-9-9 at 12-13 and fn. 23.

<sup>10</sup> Source: U.S. carrier O&D Survey data.

<sup>11</sup> See Order 99-9-9 at 11-12.

<sup>12</sup> Petition, page 7.

Such examples do not demonstrate the “marketplace reality” of open skies, which has been so successful worldwide in expanding competitive air service precisely because it frees carriers from a static and limited number of operational choices. Far from indicating that these two carriers are finding it difficult to compete in the U.S.-Chile market, United’s interest in nonstop service and Continental’s pending application to code share with Chile’s Avant, as well as with ~~other airlines, strongly suggests that they intend to compete vigorously in the U.S.- Chile and~~ other Southern Cone markets. Delta has announced that it will enter the market for the first time. Indeed, our open-skies agreement with Chile is already working to allow U.S. airlines to use their networks to enhance service and competition between the U.S. and Chile. Long-term opportunities and experience define the reality of open skies, not a snap shot of the present moment.

Continental’s Answer argues that approval of the LAN Chile-American alliance and assorted ancillary relationships with other carriers will make competition exceptionally difficult in the U.S.-Chile and other South American markets, unless the Department also gives prompt approval to competing alliances and codeshare relationships, such as the Continental-Avant arrangement, to use the new opportunities that an Open-Skies regime will bring. Continental argues that unnecessarily expansive “safety reviews” as part of the Department’s licensing and authorization process are delaying competitively needed service.

To the extent that Continental’s argument could be read that the need for increased safety input in our decisionmaking should be subordinated to the competitive circumstances of any particular case, the Department strongly disagrees. Safety is a critical element in U.S. aviation policy, and is separate from economic considerations. In the case of Avant, that foreign carrier now holds no authority to serve the United States, whether by using its own aircraft or by codeshare with another authorized carrier. Under the statute, we must find Avant fit and qualified before issuing it authority to serve the United States. Safety has always been a critical part of that determination. In addition, Continental and Avant have applied both to place U.S. codeshare service provided by Continental on Avant flights, and to place Avant codeshare service on Continental flights. Those requests require separate determinations. However, Continental appears in its Answer to amend its codeshare application to request that, in the interim, the Department should authorize Avant to place its code on Continental flights immediately, while deferring the rest of its application. We fully intend to act on this request expeditiously. The Continental-Avant service is the type of competitive response that we have seen in other **open-skies** markets, and, if approved, we expect it to provide competition and increased service opportunities in the U.S.-Chile market.

**Accordingly:**

1. We grant, to the extent indicated in this order, the petition of United Air Lines, Inc. for reconsideration of Order 99-9-9;

2. We affirm the actions taken by the Department in Order 99-9-9; and
3. We shall serve a copy of this order on all persons on the service list in this docket.

By:

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**A. BRADLEY MIMS**  
Deputy Assistant Secretary for Aviation  
and International Affairs

(SEAL)

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